could be appealed.[4] Under the code as it stood prior to the recent amendment, no such appeal could be taken. This injustice was not certain to be removed even if the Supreme Court definitely affirmed the validity of a similar statute on appeal from the court of another state which happened to rule against the federal right. At least one state court expressly declared: "We are not bound by any obligation imposed upon us in the federal Constitution to uphold a state statute merely because, in the view of the Supreme Court of the United States, it is not unconstitutional." [5] Thus the rule which has been superseded made possible a situation in which one "supreme law of the land" would have, permanently, a different meaning in different parts of the land. Moreover, it was conceivable that the Supreme Court would never have a chance to pass upon legislation which all the state courts held invalid.

The new amendment gives the Supreme Court a *discretionary power* to review by *certiorari*, or otherwise, decisions which sustain the federal right. If the decision is adverse to the federal right the losing party may still demand a writ of error from the Supreme Court *as of right*. The slight difference in procedure enables the court to free its calendar from dilatory appeals under the new jurisdiction, without impairing the position which is now assured to it as the final interpreter of the Constitution.

DIRECT RECOVERY BY A CORPORATION FOR DAMAGE SUSTAINED AS STOCKHOLDER IN ANOTHER CORPORATION. — Can a shareholder, the value of whose stock had been depreciated by a wrongful reduction of the corporate assets, circumvent the long-established principle that a stockholder cannot sue for damage to his interest caused through injury to the corporation for which the latter has a right of action,[1] by showing that the wrongdoer was simultaneously violating a duty owed the shareholder in his individual capacity? This question received its first judicial consideration in a decision just handed down by the Appellate Division of the New York Supreme Court. *General Rubber Co.* v. *Benedict*, 164 N. Y. App. Div. 332, 149 N. Y. Supp. 880.[2] The plaintiff corporation was a large stockholder in another corporation, and defendant was a director of the former but not of the latter. With

[4] Many interesting examples of this have been collected by Professor W. F. Dodd in an article entitled, "The United States Supreme Court as the Final Interpreter of the Federal Constitution," 6 Ill. L. Rev. 289. *Cf.* State *v.* Williams, 189 N. Y. 131 (1907), with Muller *v.* Oregon, 208 U. S. 412 (1908); and People *v.* Orange, etc. Co., 175 N. Y. 84 (1903), with Atkin *v.* Kansas, 191 U. S. 207 (1903).

[5] See McCollum *v.* McConaughy, 141 Ia. 172, 176, 119 N. W. 539, 540.

[1] Smith *v.* Hurd, 12 Met. (Mass.) 371, is the leading case. A stockholder brought an action on the case against certain directors for negligently permitting the corporate assets to be wasted. A demurrer to the declaration was sustained.

Other cases involving the same principle are Smith *v.* Poor, 40 Me. 415; Allen *v.* Curtis, 26 Conn. 456; Converse *v.* United Shoe Machinery Co., 185 Mass. 422, 70 N. E. 444; Niles *v.* Johnson, 69 N. Y. App. Div. 144, 74 N. Y. Supp. 617, affirmed 176 N. Y. 119, 68 N. E. 142. See 1 MORAWETZ, CORPORATIONS, 2 ed., §§ 239, 566; 4 THOMPSON, CORPORATIONS, 2 ed., §§ 4550–1; 22 HARV. L. REV. 594.

[2] This case is more fully stated in this issue of the REVIEW, p. 427. The opinion was by Dowling, J., in which Scott and Hotchkiss, JJ., concurred. There was a dissenting opinion by Ingraham, P. J., in which Laughlin, J., concurred.

defendant's acquiescence and connivance the manager of the latter misappropriated a large part of its assets to the use of still another company of which defendant and he were part owners. A demurrer was overruled to a complaint based on violation of defendant's duty as director.[3]

The true purport of this adjudication appears from a review of the reasons underlying the rule of *Smith* v. *Hurd*.[4] Where the corporation has been injured, it is primarily for its directors to proceed against the wrongdoer, but should they fail to act, the shareholder has his ultimate remedy by a bill in equity to require the assertion of the corporate right.[5] Although the shareholder has suffered indirect harm to the value of his stock, if it was through negligence of the defendant, as in *Smith* v. *Hurd*, he has no cause of action in his own name, because the law of torts does not recognize as a basis for recovery indirect negligent injury of this sort through direct damage to a third person.[6] But where, as in the principal case, the indirect injury is intentional, ordinary principles of tort liability would seem to afford direct relief.[7] Yet a universal exception is to be found where a tortfeasor interferes with a debtor's assets to the detriment of creditors. In such cases the sole cause of action is in the debtor.[8] This qualification is attended by eminently desirable results of convenience. Not only would each petty creditor with his trivial claim be a potential litigant, but also the estimation of damages in a given suit would necessitate adjudicating the extent and sufficiency of the claim of all individual creditors who might have participated in the assets destroyed. In corporation cases the reasons for making an exception are equally cogent, for not only might each holder of a single share sue for any wrongful depreciation, however trifling,[9] but, inasmuch as the rights of creditors

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[3] At the outset it is best to concede that there was a violation of defendant's duty as director in not notifying plaintiff. The dissent intimates that the director's duty did not extend to plaintiff's interest in this subsidiary corporation. This view, it is submitted, places too low an estimate upon the duties of directors. Business morality demands that all a corporation's interests be protected. On the question of a director's duties arising out of his fiduciary position, see 1 MORAWETZ, CORPORATIONS, 2 ed., §§ 516 *et seq.;* 2 THOMPSON, CORPORATIONS, 2 ed., §§ 1215–22.

[4] *Supra*, n. 1.

[5] With reference to bringing a shareholder's bill, see 1 MORAWETZ, CORPORATIONS, 2 ed., §§ 240–1; 4 THOMPSON, CORPORATIONS, 2 ed., §§ 4553–9; 22 HARV. L. REV. 594. See Hawes *v.* Oakland, 104 U. S. 450; Smith *v.* Poor, *supra*.

[6] See 28 HARV. L. REV. 307.

[7] See *ibid.* It would seem incontrovertible that the wrongdoer in misapplying the corporate funds must have had in mind, and intended, a depreciation in the value of the shares.

[8] Lamb *v.* Stone, 11 Pick. (Mass.) 527; Bradley *v.* Fuller, 118 Mass. 239; Adler *v.* Fenton, 24 How. (U. S.) 407; Klous *v.* Hennessey, 13 R. I. 332.

[9] This reason alone would not explain the cases denying relief to a sole shareholder. Fitzgerald *v.* Missouri Pacific Ry. Co., 45 Fed. 812; Randall *v.* Dudley, 111 Mich. 437, 69 N. W. 729; Cutshaw *v.* Fargo, 8 Ind. App. 691, 34 N. E. 376, 36 N. E. 650.

Shaw, C. J., in Smith *v.* Hurd, *supra*, 383, says, "If an action can be brought by one stockholder, it may be brought by the holder of a single share; so that for one and the same default of these directors, thirty-five hundred actions might be brought. If it may be sustained by proof of an act, or series of acts, of carelessness, neglect, and breach of duty, in managing the affairs of the bank, by which the whole value of the stock is destroyed, it may, on the same principle, be maintained on any act or instance

are paramount to the shareholder's interests,[10] the merits of each claim against the corporate assets would have to be collaterally determined to ascertain how much, if any, plaintiff has been damaged. In short, a thorough accounting of the corporation's finances would be in order. On the other hand, let the corporation itself sue, and the amount recovered be paid into its treasury: procedure will be simple, and the result equitable. This alone should be sufficient relief for the stockholder.

Nevertheless, if by reason of some collateral facts the shareholder is independently entitled to legal protection against this indirect harm, should that enable recovery for injury which primarily affects the property of another legal unit? The Appellate Division gives an affirmative answer where the shareholder is independently entitled by virtue of the relationship of corporation and director, which imposed a duty on the director not to connive at waste of assets of another corporation in which the plaintiff is a shareholder. Analogous cases would be those of *cestui* and trustee, agent and principal, and cases where the director expressly contracted with a stockholder not to waste corporate assets. Yet do not considerations of convenience continue to operate against recovery? The same comprehensive financial investigation would be necessary to ascertain this plaintiff's award. Likewise nothing could deter actions by such other shareholders as could invoke the benefit of the doctrine of this case, or by the subsidiary corporation itself in its own right based on defendant's connivance in the defalcation, certainly on behalf of creditors and uncompensated shareholders, if not for the whole extent of the wrong.[11]

The principal case thus presents circumstances to which the rule of *Smith* v. *Hurd* could profitably be extended. Perfect justice would be attained with relative facility by requiring that the plaintiff make the subsidiary corporation a party in any action he brings, and thus its rights, and consequently the derivative rights of shareholders and creditors, would be fully and at once adjudicated. These considerations would not apply, however, to circumstances less fortunate for the subsidiary corporation under which it would be remediless against this defendant, as, for instance, had he merely acquiesced, instead of colluded, in the misappropriation. As the plaintiff would then have no derivative redress, it would be unjust not to determine the defendant's liability to him in a direct action, and the difficulty of computing damages should not be heard in defense.[12]

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of such negligence, by which the shares are diminished in value fifty, ten, five, or one per cent."

[10] *Cf.* 2 MORAWETZ, CORPORATIONS, 2 ed., §§ 818 *et seq.*; 4 THOMPSON, CORPORATIONS, 2 ed., §§ 4990 *et seq.*

[11] Shaw, C. J., in Smith *v.* Hurd, *supra*, 386: "It is obvious to remark that a judgment in favor of one stockholder would be no bar to an action by a creditor, nor a judgment by both, to an action by the corporation."

[12] It would seem that as an essential element of his complaint plaintiff should aver facts establishing the non-liability of defendant to the subsidiary corporation. Should defendant make a *bonâ fide* denial of such non-liability, the proper procedure apparently would be for the court to stay plaintiff's suit until the corporate right be asserted and tested against defendant. If judgment should be against defendant, this suit would be dismissed. If in his favor, this suit would proceed.